

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

**No. CV 11-0559 JC/LAM
CR 09-0209 JC**

JOSE RAUL PELAEZ-DE LA O,

Defendant/Movant.

ORDER ADOPTING PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on the Magistrate Judge's *Proposed Findings and Recommended Disposition* (*Doc. 10*) (hereinafter "PF&RD"), filed on December 15, 2011. On January 17, 2012, Defendant/Movant Jose Raul Pelaez-De La O filed objections to the PF&RD. [*Doc. 13*]. Plaintiff/Respondent did not file any objections to the PF&RD nor did it respond to Mr. Pelaez-De La O's objections, and the deadlines for doing so have passed. The Court has reviewed the PF&RD and Mr. Pelaez-De La O's objections and finds that his objections are without merit. Accordingly, the Court will: (1) overrule Mr. Pelaez-De La O's objections as meritless; (2) adopt the PF&RD; (3) deny *Jose Raul Pelaez-De La O's Motion to Vacate Conviction Pursuant to 28 U.S.C. § 2255* (*Doc. 1*); and (4) enter a judgment dismissing this case with prejudice.

In the PF&RD, the Magistrate Judge found that Mr. Pelaez-De La O's Section 2255 motion was untimely because it was filed outside the one-year time period in 28 U.S.C. § 2255(f)(1), and further found that, because the holding in *Padilla v. Kentucky*, -- U.S. --, 130 S.Ct. 1473 (2010) does not apply retroactively, Mr. Pelaez-De La O's Section 2255 motion is also untimely under 28 U.S.C. § 2255(f)(3). [*Doc. 10* at 4-5] (citing *United States v. Hong*, --- F.3d ---,

2011 WL 3805763 (10th Cir. 2011) (“*Padilla* does not apply retroactively to cases on collateral review.”). Mr. Pelaez-De La O objects to the Magistrate Judge’s finding that his Section 2255 motion was not timely, contending that, even though the Tenth Circuit has held that *Padilla* does not apply retroactively to Section 2255 cases, “the issue of the retroactivity of *Padilla* is a live issue in the courts nationally, and there are [sic] a diversity of views on this subject.” [*Doc. 13* at 4]. Mr. Pelaez-De La O states that “[a]lthough the Tenth Circuit’s decision [in *Hong*] may be binding on this Court, it is likely that the Tenth Circuit’s word on this subject will not be the final word.” *Id.* Mr. Pelaez-De La O asks the Court to “hold in abeyance a decision on the retroactive application of *Padilla* until the United States Supreme Court decides this matter[, or i]n the alternative . . . that the Court hold that *Padilla* applies retroactively to Mr. Pelaez’s case.” *Id.*

The Court finds that the Magistrate Judge was correct in following the binding precedent of the *Hong* decision. Mr. Pelaez-De La O contends that the holding in *Hong* is not controlling because the issue there was the issuance of a certificate of appealability. [*Doc. 13* at 22-23]. The Court disagrees. The standard for issuing a certificate of appealability is whether the appellant “has made a substantial showing of the denial of a constitutional right.” *Hong*, 2011 WL 3805763, at *2 (citation and internal quotation marks omitted). The Tenth Circuit in *Hong* determined that *Padilla* was not retroactive and Mr. Hong’s Section 2255 motion was, therefore, untimely. *Id.* at *10. The Tenth Circuit’s holding is not limited to whether a certificate of appealability should be issued. Instead, the Tenth Circuit held that *Padilla* does not apply retroactively to cases on collateral review, which encompasses Mr. Pelaez-De La O’s Section 2255 motion. The Court is bound by this holding and finds that Mr. Pelaez-De La O’s objection is without merit.

The Court further declines to hold its decision on Mr. Pelaez-De La O’s Section 2255 motion in abeyance. While the United States Supreme Court may one day decide whether the holding of

Padilla should apply retroactively, the United States Supreme Court has not granted a writ of certiorari on this issue as of this date. The Court declines to hold its decision on this case in abeyance absent a more definite posture of the case before the United States Supreme Court. For these reasons, the Court finds that Mr. Pelaez-De La O's objections are without merit and shall be overruled.

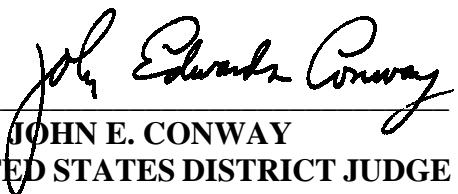
IT IS THEREFORE ORDERED that Mr. Pelaez-De La O's objections to the PF&RD [Doc. 13] are **OVERRULED**.

IT IS FURTHER ORDERED that the Magistrate Judge's *Proposed Findings and Recommended Disposition* (Doc. 10) are **ADOPTED** by the Court.

IT IS FURTHER ORDERED that *Jose Raul Pelaez-De La O's Motion to Vacate Conviction Pursuant to 28 U.S.C. § 2255* (Doc. 1) is **DENIED**.

IT IS FURTHER ORDERED that this case be **DISMISSED WITH PREJUDICE** and that a final judgment be entered concurrently with this order.

IT IS SO ORDERED.



HONORABLE JOHN E. CONWAY
SENIOR UNITED STATES DISTRICT JUDGE